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No. 02-1097

In the Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Fifth Appellate District

BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE CALIFORNIA CHAMBER OF COMMERCE, FLORIDA CHAMBER OF COMMERCE, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, GENERAL AVIATION MANUFACTURERS ASSOCIATION, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, SPORTING GOODS MANUFACTURERS ASSOCIATION, THE AMERICAN TORT REFORM ASSOCIATION, THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND THE ILLINOIS CIVIL JUSTICE LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are organizations that together represent business companies and associations of businesses engaged in all forms of manufacturing and other commerce throughout the United States and around the world. In this era of expansive tort litigation against corporations and even entire industries, *amici*'s members have been forced to defend against products liability lawsuits seeking millions and sometimes billions of dollars in jury-imposed punitive damages. It has been *amici*'s experience that, in such cases, the lower courts routinely have been misapplying and, indeed, effectively nullifying the three excessiveness guideposts identified by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). *Amici* are uniformly of the view that the lower courts need guidance from this Court as to the proper application of the *BMW* guideposts in the products liability context and have joined together in both this case and *Ford Motor Co.* v. *Estate of Tommy Smith*, No. 02-1096, to urge the Court to grant plenary review in one or both of these cases to provide that needed guidance.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the last dozen years, this Court has addressed (or will address) excessiveness challenges to punitive awards in five cases — *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996); *Cooper Indus. Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441-

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that preparation and submission of this brief was funded entirely by *amicus curiae* the Product Liability Advisory Council, Inc. ("PLAC"). PLAC is a non-profit association with 131 corporate members who seek to contribute to the improvement and reform of the law governing the liability of product manufacturers. A complete list of PLAC's members is attached hereto as Appendix A.

443 (2001); *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, No. 01-1289 (argued Dec. 11, 2002).

Significantly, none of these cases involved a products liability claim.[2] As a consequence, lower courts have found a lack of clear guidance as to the proper application of the *BMW* guideposts in the products liability context. Left to their own devices, they have often misapplied or, like the court below, refused outright to apply the guideposts, essentially on the ground that death (or serious personal injury) is different. Ironically, there is no context in which it is ***more*** important to ensure that punitive damages are not arbitrary and do not exceed society's interest in rational deterrence than this one. Products are the lifeblood of the American economy. Multimillion dollar punitive awards rendered against manufacturers who have made good-faith design decisions and whose products meet and even exceed federal safety standards not only deprive product manufacturers of property without fair notice but have the inevitable effect of chilling innovation, encouraging excessive precautions, and increasing the price of products beyond the means of many potential purchasers.

Amici believe, therefore, that it is vitally important for the Court to grant plenary review in a products liability case to supply needed guidance as to the proper excessiveness inquiry in this context. We further submit that this case and *Ford* v. *Smith* are ideal for providing this needed guidance. Together, these two cases provide the Court with the opportunity to explain (i) the criteria that should be considered in determining when a product manufacturer's decision to employ a design later found by a jury to be defective should be treated as sufficiently reprehensible to warrant "a punitive sanction that is tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585); (ii) the role of the ratio guidepost when compensatory

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[2] The Court has used a product liability case to address the ***procedural*** requirements for administration of punitive damages. See *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

damages are high, the probability of escaping liability for tortious conduct is low, and the compensatory damages exceed the defendant's "gain" from choosing the design at issue over the supposedly safer one proposed by the plaintiff; (iii) the proper application of the comparative fines guidepost when the plaintiff seeks to analogize the defendant's tort to criminal conduct; and (iv) the significance of the fact that, when the conduct involves the design of a mass-produced product, other juries may either vindicate the defendant or seek to punish it for the same design decision. As we discuss below, each of these four issues recurs in products liability litigation and is well illustrated in the two Ford cases that are now before the Court.

ARGUMENT

Only seven years ago, this Court observed that a $2 million punitive damages award is "tantamount to a severe criminal penalty" and suggested that punishment of this magnitude must be reserved for "egregious" misconduct. *BMW*, 517 U.S. at 585. While many courts have taken that admonition to heart in cases that have not involved personal injury by ordering remittiturs of large punitive awards to mere fractions of themselves, we are aware of ***no*** post-*BMW* products liability case in which a reviewing court has ordered a remittitur of a punitive award to less than seven figures. In other words, in every post-*BMW* products liability case involving a sustainable finding of punitive liability, the reviewing court concluded that the defendant warranted a punishment "tantamount to a severe criminal penalty." These penalties have ranged from a $1.09 ***billion*** dollar punitive award (reduced from $4.8 billion) in a case alleging that General Motors defectively designed its gas tanks by placing them behind instead of above the rear axle to the $290 million penalty in this case to a $79.5 million penalty in an individual smoker's tobacco case to the $15 million punishment in *Ford* v. *Smith* to a $1 million penalty in the case of a fishbowl that shattered while being carried. It defies common sense, however, to suggest that every products liability case in which there is sufficient evidence to support ***some***

amount of punitive damages is one in which a penalty of ***millions*** or ***hundreds of millions*** of dollars is warranted. See *BMW*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."). As this case and *Ford* v. *Smith* both well illustrate, the lower courts are routinely misapplying the *BMW* guideposts to uphold seven, eight, and nine-digit punitive awards precisely ***because*** the cases involve products liability. The two cases are thus excellent vehicles for providing the lower courts with much- needed guidance as to the proper excessiveness analysis in the products liability context.

A. The Lower Courts Are Systematically Misapplying The First Guidepost By Treating The Marketing Of Products Entailing Risk Of Personal Injury As Reprehensible *Per Se*.

"Perhaps the most important indicium of the reasonableness of a punitive damages award" (*BMW*, 517 U.S. at 575), the degree of reprehensibility of the defendant's conduct is also the guidepost most susceptible to misapplication in products liability actions. The linchpin of this guidepost is "the accepted view that some wrongs are more blameworthy than others." *Ibid.* This guidepost thus requires reviewing courts to locate the conduct on a spectrum of reprehensibility, with a "high degree of culpability" necessary for "a substantial punitive damages award" (*id.* at 580). Reviewing courts have gone astray by treating products liability as a category that uniformly resides at the high end of the reprehensibility spectrum — without any serious effort at intra-category comparison — merely because such cases tend to involve serious personal injury.

Unlike many other classes of torts, products liability claims by definition involve physical injuries or death. Looking through the virtually inescapable lens of hindsight bias at a

seriously injured plaintiff on the one hand and a large corporate defendant that balanced safety against other benefits such as product usefulness, attractiveness, and cost to consumers on the other, juries are easily provoked to a state of outrage that leads them to award astounding sums in punitive damages irrespective of the true culpability of the defendant's conduct or the need for punishment and deterrence. As Judge Easterbrook has explained in a case involving the design of the emergency stop button on an escalator:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *
>
> Come the lawsuit, however, the passenger injured by a stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. *Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (corporations' "superior ex ante risk judgments may be outweighed by the ex post reality of the accident victim"); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 552 (2000) (mock juror study revealed that even proper corporate balancing of risks against costs leads to

inflated punitive damages awards). Such hindsight bias is compounded substantially when the plaintiff is able to show that the defendant employed cost-benefit analysis in selecting one particular design rather than another — that the defendant "traded lives for dollars." See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 11 (1982)).[3]

As this Court has recognized, appellate review can play a vital role in filtering out such bias and helping to ensure that punitive awards comport with the requirements of due process. See *Haslip*, 499 U.S. at 21 ("appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"). But when appellate courts evaluating reprehensibility make precisely the same errors that infected the underlying jury verdicts, such review does nothing to ameliorate the constitutional violations.[4]

The present case is illustrative. Nominally applying the reprehensibility guidepost, the court below found Ford's

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[3] Ironically, the corporate cost-benefit analysis that drives juries to award massive punitive damages is the very same risk-utility test that jurors are instructed to apply in making the underlying liability determination. See *Soule* v. *General Motors Corp.*, 882 P.2d 298, 311 (Cal. 1994) (jury must evaluate allegedly defective automobile design by balancing and weighing "such competing design considerations as risk, benefit, feasibility, and cost").

[4] The problem is exacerbated when, as in this case, the appellate court bases its decision on factual findings that the jury never even made. Like petitioner, we believe that review is warranted not only to address the proper application of the *BMW* guideposts in the products liability context, but also to clarify that, when conducting the *de novo* review required by *Cooper Industries*, courts should defer only to factual findings actually made by the jury, not to every inference that could conceivably be drawn from the evidence, when there is no reason to infer that the jury actually drew such inferences.

conduct to be "grossly reprehensible," stating:

> While defendant did not intend the death to the victims, the award here cannot be compared to cases involving a business fraud resulting only in economic harm. Further, the malicious conduct involved mass production and marketing of the dangerous vehicle purely for defendant's economic betterment. Unlike *BMW*, where the defendant's conduct was not even unlawful in all states and involved only economic consequences, the conduct here placed tens of thousands of lives at risk and actually claimed three such lives in the present case.

Pet. App. 38a (internal quotation marks and citations omitted).[5]

In other words, the court below held that Ford's conduct was at the extreme high end of the reprehensibility spectrum merely because (a) Ford knowingly (*i.e.*, intentionally) mass produced and sold a product that, although useful and highly desirable to consumers, also entailed some risk of harm, and (b) an accident involving that product resulted in the deaths of three people. In so doing, the court turned on its head the first principle of products liability law — that because most products entail some risk of harm, the task of a responsible manufacturer is to strike a reasonable balance between safety and a host of other considerations, including "marketability,

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[5] Indeed, in responding to Ford's argument that there was insufficient evidence to support a finding of "malicious or despicable" conduct, the court was even more forthright, holding:

> [Ford's argument] ignores the fact that the design and production of the vehicle was the despicable conduct * * *. Such conduct could kill people. The question is not whether the conduct, if it occurred, was despicable, the question is whether there is sufficient evidence from which a rational trier of fact could find that the knowing conduct occurred.

Pet. App. 25a-26a.

appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 88-89 (1985). Thus, the same activities that are the hallmark of good corporate behavior and should generally insulate the defendant from all liability (see note 3, *supra*) — or, at most, should be a basis for compensatory damages only — were treated as an aggravating factor supporting a jaw-dropping nine-figure punitive exaction.[6]

By conflating intentional ***conduct*** — *i.e.*, cost-benefit analysis in design decisions and the marketing of products — with intentional ***harm*** — *i.e.*, "affirmative acts of misconduct" (*BMW*, 517 U.S. at 576) — the court below deprived the reprehensibility guidepost of any constraining force in the products liability context. As one commentator has explained, design defect cases inevitably involve "'conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994).[7] The consequence of equating complex design

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[6] Cf. Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 ALA. LAW. 46, 49 (1997) ("Regardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money. As a result, an argument for reprehensibility can be supported in virtually every case.").

[7] See also, *e.g.*, Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 566 ("undertaking [cost-benefit] analysis and making a

decisions for inherently dangerous products like automobiles with intentionally harming the injured plaintiff is that "every actor could be held strictly liable [under that standard] for punitive, in addition to compensatory, damages for any consequence to any person that was contemplated in advance of any course of action." Owen, *supra*, 49 U. CHI. L. REV. at 22; see also *id.* at 23 ("The decision to market a product in a certain condition with certain risks may have been a good one because the expected benefits were great, and the product may not have been legally defective at all, yet under this standard the manufacturer remains subject to punishment for 'disregarding' the lesser risks by proceeding to sell the product with any danger whatsoever").

When that distorted view of intentionality is imported into the reprehensibility analysis, any attempt by a manufacturer to "think about risks in a systematic manner and to undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" (Viscusi, *Corporate Risk Analysis*, *supra*, 52 STAN. L. REV. at 550) will be seen as the egregious misconduct justifying severe punishment under *BMW*. And the resulting sky's-the-limit punitive awards will deter the socially responsible commercial behavior that products liability law was designed to foster.

Unfortunately, the court of appeal's simpleminded equation of knowledge that a product can cause death or physical injury with high reprehensibility — while sloughing off such objective indicia of low reprehensibility as compliance with federal safety standards and consistency with industry customs and

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conscious [and correct] decision to forego the improvement will subject a company to the charge that it 'deliberately intended to injure the plaintiff'"); Owen, *supra*, 49 U. CHI. L. REV. at 26 ("a manufacturer's choices involving necessary safety trade-offs and statistically inevitable risks always can be viewed in a sense as intentional wrongs to consumers hurt by such products, as safe on balance as such products may actually be") (footnote omitted).

practice — is not unique.[8] To the contrary, we are unaware of a single published post-*BMW* opinion concluding that a manufacturer's conduct was not sufficiently egregious to warrant the penalty imposed. This Court's guidance as to the proper application of the reprehensibility guidepost in the products liability context is therefore urgently needed.

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[8] See, *e.g.*, *Clark* v. *Chrysler Corp.*, 310 F.3d 461, 482 (6th Cir. 2002) ("Chrysler's conduct resulted in the loss of life, which clearly evidences a greater disregard for the rights and safety of others than failure to reveal that a car has been repainted."); *Sand Hill Energy, Inc.* v. *Ford Motor Co.*, 83 S.W.3d 483, 494 (Ky. 2002) (rejecting arguments that truck transmission conformed to industry standards, was never subjected to recall, and involved "good faith judgment call" as to reasonableness of design, and concluding that conduct was reprehensible because "by Ford's own engineers and through many consumers, some of whom were maimed or killed, Ford was forcefully informed that its transmission was dangerous"), pet. for cert. pending sub nom. *Ford Motor Co. v. Estate of Tommy Smith*, No. 02-1096; *Cooper Tire & Rubber Co.* v. *Tuckier*, 826 So. 2d 679, 690 (Miss.) (holding that, although only 1 out of 66,000 tires was defective, "[w]hen this one defective tire results in a person's death, there is sufficient evidence to establish" reprehensibility), cert. denied, 123 S. Ct. 97 (2002); *Waddill* v. *Anchor Hocking, Inc.*, 27 P.3d 1092, 1098 (Or. Ct. App. 2001) ("conscious indifference to the possibility that the fishbowl could injure someone during ordinary use and the failure to warn of that possibility * * * implies a wilful disregard of a known risk to consumer safety"), pet. for cert. pending, No. 02-370; *North Am. Refractory Co.* v. *Easter*, 988 S.W.2d 904, 919 (Tex. Ct. App. 1999) (reprehensibility guidepost satisfied even though defendant "believed that its products were safe," because its product "endangered the health and safety of at least three individuals").

B. The Lower Courts Are Systematically Misapplying The Second Guidepost By Viewing High Compensatory Damages As Automatically Justifying High Ratios And Large Punitive Awards.

In *BMW*, this Court quite properly rejected a "categorical approach" to the ratio guidepost, reminding bench and bar that it is impossible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 517 U.S. at 582-583. Unfortunately, many lower courts have construed this pronouncement to be an invitation to disregard the ratio guidepost rather than to build an analytical framework through case-by-case development. Nowhere is this problem more evident than in the products liability context. Not only do some courts employ a mathematical bright line rule that single-digit ratios are per se indicative of a constitutionally permissible punishment — no matter how large the compensatory damages may be — but others have simply cast aside the reasonable relationship requirement on the ground that the injuries were severe.[9] Because products liability actions by definition

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[9] See, *e.g.*, *Burton* v. *R.J. Reynolds Tobacco Co.*, 205 F. Supp. 2d 1253, 1263 (D. Kan. 2002) (allowing $15 million in punitive damages, or 76.4 times compensatory damages, on theory that personal injuries warrant greater ratios than economic injuries); *Sand Hill Energy*, 83 S.W.3d at 494 (affirming punitive damages of 5 times multimillion dollar compensatory award because "[t]he harm to Tommy Smith was death. The harm to his estate was the total destruction of his power to labor and earn money. It would be impossible to overstate the degree of harm."); *Williams* v. *Philip Morris Inc.*, 48 P.3d 824, 840-842 (Or. Ct. App. 2002) (affirming punitive damages award of $79.5 million, or 97 times compensatory damages, because "the jury could have found that defendant's actions resulted in Williams' death; based on that finding, it could have believed, in light of defendant's profits, that only a large award would be proportionate to the harm that defendant caused"); *Waddill*, 27 P.3d at 1099 ("It is common knowledge that broken glass is dangerous and can cause serious injuries. We cannot say that it is

involve death or physical injury, this circular approach renders the ratio guidepost a nullity in such cases.

Once again, the present case is illustrative. The court below expressly reasoned that "the importance of the [ratio] factor is somewhat reduced" and affirmed the $290 million punitive exaction notwithstanding the 63:1 ratio on the ground that the multimillion dollar "wrongful death compensatory damages do not fully reflect the harm to the victims." Pet. App. 39a. In other words, the court evaded the ratio guidepost by beginning with an already large compensatory award and then positing that, because people died, the compensatory damages necessarily understate the actual harm to the plaintiffs — this despite the fact that California imposes no cap on either economic or non-economic damages.

Other courts, though not expressly jettisoning the ratio guidepost entirely, have disregarded this Court's statement in *BMW* that there is no single ratio that fits all cases and instead have reflexively assumed that, when the ratio is in the single — or even double — digits, no further analysis is necessary to conclude that the punitive award comports with due process. In *Smith*, for example, the Kentucky Supreme Court apparently felt that it had discharged its duty under *BMW* by reducing the punitive award from a ratio of approximately 7:1 to 5:1. See *Sand Hill Energy*, 83 S.W.3d at 496. It accordingly gave no consideration to whether a 5:1 ratio that yields a $15 million punitive exaction is indicative of excessiveness in view of such factors as the absence of a financial motive for designing the

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excessively disproportionate to punish a company that makes glass products that can cause the degree of damage that plaintiff suffered by an award that is no more than ten times the actual injury that its actions caused."); *Ford Motor Co.* v. *Ammerman*, 705 N.E.2d 539, 562 (Ind. Ct. App. 1999) (affirming ratio of 2.73:1 on $4 million compensatory award and 18.25:1 on $400,000 compensatory award because, "[u]nlike *Gore* the injuries suffered by the plaintiffs in this case are physical, permanent, and severe").

transmission as Ford did, the fact that Ford's design was identical to those of most other automakers, the fact that NHTSA repeatedly has found the design not to be defective, and the fact that numerous juries have exonerated Ford of even compensatory liability for the design. See Pet. for Cert. at 6-7, *Ford Motor Co.* v. *Estate of Tommy Smith*, No. 02-1096.

This Court already has indicated that high ratios like the one in *BMW* weigh in favor of a finding of excessiveness when damages are not small and the conduct, albeit an intentional tort, is not egregious. It also has identified several circumstances in which a high ratio of punitive to compensatory damages may be justified: when "a particularly egregious act has resulted in only a small amount of economic damages"; when "the injury is hard to detect," suggesting that the defendant could have expected to escape liability for its conduct and be underdeterred as a result; and when "the monetary value of noneconomic harm might have been difficult to determine," prompting concern that the defendant has not been made to internalize the full social costs of its conduct and thus has been underdeterred. *BMW*, 517 U.S. at 582. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877-900 (1998) (explicating economic theory of deterrence). The Court has not, however, had the opportunity to fill in other boxes in the matrix. Most notably, it has not addressed the situation presented here and in other products liability cases in which the harm is not intentional, the compensatory damages are themselves in the seven figures and far exceed any rational (and fairly apportioned) measure of the defendant's "ill-gotten" gain from its conduct, and there is no possibility that the harm would go undetected.

The present case and *Ford* v. *Smith* together present this Court with an ideal opportunity to provide further guidance regarding proper application of the ratio guidepost in this recurring context. Although the ratios in the two cases are dramatically different — 63:1 and 5:1 — both cases afford the

Court the opportunity to expound on the circumstances in which even a modest ratio may be indicative of an excessive punishment. In both cases, the defendant concededly did not act with malicious intent; in both cases, the source of the harm was not difficult to detect, obviating any concern that the defendant might escape liability for tortious conduct; in both cases, the compensatory damages are largely noneconomic and run into the millions of dollars, making it unlikely that the award understated the injury; and in both cases, the compensatory damages far outstrip the amount the defendant could be said to have "gained" by virtue of choosing the design at issue over the one proffered by the plaintiffs' expert.

In this case for example, the evidence was that the cost of including a roll bar in 1978 and 1979 Broncos would have been $10 to $12 per vehicle. When multiplied by the total number of Broncos sold without a roll bar, the amount that Ford can be said to have saved by choosing the design that it did rather than the alternative design proposed by plaintiffs' expert is in the range of $1,485,000 to $1,782,000 — a fraction of the $6.2 million in compensatory damages that plaintiffs received, even without any additional punitive award.[10] In *Ford* v. *Smith*, it is a matter of common sense that Ford saved ***nothing*** by choosing to locate the point of hydraulic release where it did.

It is a matter of common sense and wide judicial and scholarly recognition that, in such circumstances, the compensatory damages ordinarily suffice to achieve appropriate

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[10] Although for purposes of illustrating our point, we have calculated the "gain" by reference to the total number of 1978 and 1979 Broncos sold nationwide, we do not mean to suggest that it would be permissible for a jury in an individual case, applying the law of a single state, to seek to remove the entire gain from the nationwide sale of a product. Not only would that violate the prohibition against extraterritorial punishment articulated in *BMW;* it also would fail to account for the exoneration and excessive aggregate punishment problems discussed in Section D, *infra*.

deterrence.[11] It follows that even a 1:1 ratio may therefore reflect that the punitive award is excessive in relation to the state's interest in deterrence. Self-evident though these concepts may seem, however, not a single reviewing court confronted with a punitive award in the products liability context has even contemplated the possibility that the factors present in such a case may mandate that a lower ratio be regarded as the dividing line between a permissible and an unconstitutional punishment. Review is warranted to provide

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[11] See, *e.g.*, *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory") (emphasis omitted); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Maiorino* v. *Schering-Plough Corp.*, 695 A.2d 353, 370 (N.J. Super. Ct. App. Div. 1997) (concluding that "the large compensatory damage award to Maiorino of $435,000 by itself provided significant deterrence even to an employer as large as Schering" and holding therefore that "[a]n $8,000,000 punitive damage award was not necessary to punish Schering or to deter it and other employers from engaging in the type of conduct found to be discriminatory by the jury"); Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2082 (1998) ("Compensatory damages work well for deterrence if and only if it is easy to identify the injurer, bring suit, and collect full damages. Under these conditions, the wrongdoer faces liability for the full social costs of the wrong. Thus there is no need for additional damages if the probability of detection and successful suit for compensation is 100%."); George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 La. L. Rev. 825, 831 (1996) ("[T]he strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents — not too little and not too much. For purposes of deterrence or accident prevention, there is no need for punitive damages of any dimension, not to mention unlimited punitive damages, given the availability of full compensatory damages.") (footnote omitted).

needed guidance with respect to this guidepost.

C. The Lower Courts Need Guidance As To The Proper Application Of The Third Guidepost When The Plaintiff Seeks To Analogize The Defendant's Design Decision To A Crime Punishable By Imprisonment.

The decision below also is emblematic of a recurring misapplication of the third *BMW* guidepost, which calls for a comparison of the punitive award with "civil or criminal penalties that could be imposed for comparable misconduct" (517 U.S. at 583). Eschewing the congressionally established fine for marketing defective vehicles,[12] the court of appeal equated Ford's design decision with "involuntary manslaughter" (Pet. App. 35a), and reasoned that the third guidepost was therefore entirely "inapplicable" (*id.* at 39a). It explained: "Such a comparison [with civil fines] is appropriate when the conduct to be punished cannot result in imprisonment if committed by an individual, but is inappropriate when the malicious conduct could result in substantial imprisonment if committed by an individual instead of a corporation." *Ibid.* Other courts likewise have used this rationale to nullify the third guidepost or to invoke it affirmatively as justification for multimillion dollar punishments.[13]

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[12] In 1978 and 1979, the model years in question, the maximum fine for selling an entire fleet of defective vehicles nationwide was $800,000. 49 U.S.C.A. § 30165(a) (West 1997).

[13] See, *e.g.*, *Bielicki* v. *Terminix Int'l Co.*, 225 F.3d 1159, 1166 (10th Cir. 2000) (refusing to give weight to $5,000 civil penalty under FIFRA and explaining that, "[a]lthough the punitive damages award is exceptional when compared only to the applicable fines, the authorization of imprisonment in the criminal context can justify a higher award"); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 2001 WL 1246676, at *17 (Utah Oct. 19, 2001) (disregarding applicable fines for unfair insurance practices in part because "State Farm's officers could be imprisoned" for those practices), cert. granted, 122 S. Ct. 2326 (2002); *Cass* v. *Stephens*, 2001 WL 28092, at *33 (Tex.

Because virtually any tort can be restated as a crime, analysis of this sort would remove all limitations on punitive damages in products liability actions, and, indeed, in any case involving personal injuries. If Ford's conduct here can be equated with the crime of involuntary manslaughter, so can any wrongful death case in which punitive damages are awarded. A reviewing court could vitiate the constitutional guidelines recognized in *BMW* in any personal injury case by equating the conduct with battery or mayhem, crimes that also can carry prison sentences. And any tort causing property damage could be analogized to malicious mischief. Indeed, the same over-generalizing logic could characterize the conduct in *BMW* as criminal fraud — for which offenders can be imprisoned. By this device alone, decisions like the one in this case render the third *BMW* guidepost a dead letter. In the event the Court does not reach this issue in *State Farm*, the present case is an ideal vehicle for doing so.

D. The Lower Courts Need Guidance Regarding The Proper Application Of The *BMW* Guideposts When The Plaintiff Has Encouraged The Jury To Punish The Defendant For The Effects Of Its Design Decision On Individuals Who Are Not Before The Court.

Another feature of products liability cases that renders it essential for this Court to give plenary consideration to such a case is the fact that hundreds of thousands if not millions of other people will have used or come into contact with the product for which the plaintiff is seeking to impose punishment. Indeed, the recitation of the number of other units on the market or other people injured by the product is a routine feature of closing arguments in such cases, as both the present case and *Ford* v. *Smith* well illustrate. See Pet. for Cert. at 3-4, 25 n.12; Pet. for Cert. at 5, 15-16, *Ford Motor Co.* v. *Estate of Tommy*

Ct. App. Jan. 11, 2001) (upholding $5 million and $2.5 million punitive awards in oil and gas accounting case in part because theft of property is punishable by imprisonment).

Smith, No. 02-1096. But, with the encouragement of plaintiffs' counsel, juries and reviewing courts consistently act as if the case before them is the only one in which the defendant will be or has been sued, while paradoxically assuming that the product is injuring or is likely to injure multiple people, for which fact the defendant should be severely punished.

This kind of approach presents twin problems of constitutional magnitude. On the one hand, if a verdict that is not limited to punishing for the injury caused to the particular plaintiff is aberrational — either because the product has not in fact injured anyone else or because the defendant has been vindicated in the preponderance of other cases alleging the same defect — it necessarily will overpunish the defendant in violation of due process. In addition, to the extent it overrides the determinations of juries in other states, such a verdict violates the deeply embedded constitutional principle that states are co-equal sovereigns. *BMW*, 517 U.S. at 571-573; see also *White* v. *Ford Motor Co.*, 312 F.3d 998, 1013-1020 (9th Cir. 2002). On the other hand, if other juries have in the past or could in the future impose punitive damages against the defendant for the same design, allowing the punishment to be predicated on or sustained on the basis of statistics about the number of units sold or the number of people injured is a recipe for an excessive aggregate punishment that violates the defendant's due process rights.[14]

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[14] For a more detailed treatment of these and related problems associated with the propensity of courts to allow punishment to be based on the fact that the defendant's conduct may have affected other individuals who are not before the court, see Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner, *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, No. 01-1289 (argued Dec. 11, 2002). For a recent scholarly treatment of this subject, see Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (arguing that there is no historical basis for — and the

Once again, the present case and *Ford* v. *Smith* are perfect illustrations of these dual problems.[15] In the present case, it is undisputed that no other court or jury — in 25 years — has ever found the design defect alleged here. See Pet. for Cert. at 4 n.2. Yet plaintiffs sought and received a punishment that removed the total profits from the sale of all 1978 and 1979 Broncos ***three times over***. In upholding this enormous exaction, the court of appeal took no account of the fact that the verdict might have been an aberration; nor did it consider the possibility that, if anyone else ever were to be injured as a result of the roof design, that person might be entitled to his or her own punitive damages award, presumably again calculated with reference to the number of vehicles marketed with this design.

In *Smith*, the record reflects that numerous other juries had vindicated Ford in cases in which plaintiffs had claimed a defect in the design of its transmission. See Pet. for Cert. at 7,

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Constitution forbids — allowing juries to impose punitive damages for injuries to individuals other than the plaintiff).

[15] There are many other examples of cases in which courts demonstrated no concern about the aberrational verdict and excessive aggregate punishment problems. See, *e.g.*, *Williams*, 48 P.3d at 839, 841 (reinstating $79.5 million punitive award in tobacco case in part because it was "reasonably inferable from the evidence that defendant's products * * * caused a significant number of deaths each year in Oregon during the pertinent time period," while g ving no weight to fact that other juries in both Oregon and elsewhere had been and would continue to be asked to punish defendant for the same conduct); *Ammerman*, 705 N.E.2d at 560-564 (upholding $13.8 million punitive award derived from amount it would have cost defendant to retool its factories in order to remedy the defect, notwithstanding fact that other juries had exonerated defendant); *Owens-Corning Fiberglas Corp.* v. *Ballard*, 739 So. 2d 603, 607 (Fla. Dist. Ct. App. 1998) (giving no weight to fact that defendant had 7,000 pending claims against it, in course of upholding $31 million punitive award), approved, 749 So. 2d 483 (Fla. 1999).

Ford Motor Co. v. *Estate of Tommy Smith*, No. 02-1096. In addition, NHTSA, the expert federal agency, has repeatedly declined to find the very defect upon which respondent's judgment rests. *Id.* at 6-7, 23 n.9. In such circumstances, it is the height of unfairness to allow a litigant in an individual case to deprive Ford of its vindications by prevailing upon the jury to punish it on behalf of all 200 people who plaintiff alleged were killed as a result of Ford's design choice.

The consequence of allowing any one jury that power is to ensure that, sooner or later, every manufacturer of any product that is involved in a non-negligible number of injuries will be subjected to at least one and maybe several enormous punitive exactions — even if, as in this case, it appears that no other person has ever alleged the defect found by the jury or, as in *Smith*, the vast majority of juries have concluded not only that the defendant did not act with an egregious mental state but that the product was not defective at all. In other words, a run-away jury in a single case could arrogate to itself the power to make a once-and-for-all determination that a product should never have been placed on the market — thus wiping out all of the other jury verdicts and regulatory findings exonerating the defendant. Review is warranted to provide the lower courts with needed guidance regarding this important, recurring issue in products liability cases.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Altec Industries
Altria Group, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Ansell Healthcare, Inc.
Appleton Papers, Inc.
Astec Industries
Aventis Pharmaceuticals
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP Amoco Corporation
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Meyers Squibb Company
Brown and Williamson Tobacco
Brown-Forman Corporation
Caterpillar Inc.
CCA Industries, Inc.
Centerpulse USA Inc.
Chevron Corporation

Compaq
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Delphi Corporation
Dorel Juvenile Group, Inc.
E & J Gallo Winery
E.I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
ExxonMobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
GlaxoSmithKline
GLOCK, Inc.
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.

Joy Global, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors North America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Sears, Roebuck and Co.
Shell Oil Company
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated

Sofamor Danek, Medtronic Inc.
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Textron Inc.
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company
The Procter & Gamble Company
The Sherwin-Williams Company
Thomas Built Buses, Inc.
Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Whirlpool Corporation
Wilbur-Ellis Company
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.

(This list is current as of March 24, 2003)